Supreme Court U.S.
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No: _____

IN THE

SUPREME COURT OF THE UNITED STATES

ZOL HOOPER - PETITIONER

vs.

CITY OF MURFREESBORO - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF TENNESSEE, MIDDLE DIVISION

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1: Whether it is mandatory for a State to comply with the National Manual For Uniform Traffic Control Devices (MUTCD), as published by the Federal Highway Administration (FHWA), when setting, posting and maintaining speed limits?

2: Whether the term "should" as used in the MUTCD, is distinct from the terms "shall" (used to signify unconditionally mandatory requirements) and "may" (used to signify purely optional actions)?

3: Whether the State may enforce speed limits per se if they are not set, posted or maintained in conformance with the MUTCD?

LIST OF PARTIES

All parties to the proceeding are named in the caption of this case.

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CITATION OF OPINIONS AND ORDERS ENTERED IN THE CASE:

City of Murfreesboro v. Zol Hooper, Circuit Court for Rutherford County, Tennessee, at Murfreesboro, No. 53483, Order Dismissing Appeal, filed September 6, 2006.

City of Murfreesboro v. Zol Hooper, Court of Appeals of Tennessee at Nashville, June 12, 2007 Session, No. M2006-02050-COA-R3-CV, Memorandum Opinion filed August 14, 2007.

City of Murfreesboro v. Zol Hooper, Supreme Court of Tennessee at Nashville, Circuit Court for Rutherford County, No. 53483; No. M2006-02050-SC-R11-CV, Order denying application for permission to appeal filed November 13, 2007.

BASIS FOR JURISDICTION

The date on which the Tennessee Supreme Court, the highest state court, decided this case was: November 13, 2007. A copy of that Order denying permission to appeal appears at Appendix D.

No petition for rehearing nor extension of time was sought.

Rule 12.5 was not relied upon.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

TABLE OF AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8, (Powers of Congress)

> Clause 3: To regulate Commerce ... among the several States...
>
> Clause 7: To establish Post Offices and Post Roads.

Article VI, Clause 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code Title 23 - Highways

23 U. S. C. Chapter 3 - General Provisions

> Section 315. Rules, regulations, and recommendations
>
> ... the Secretary [of Transportation] is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title. The Secretary may make such recommendations to the Congress and State transportation departments as he deems necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

23 C. F. R. 655.603 (April 1, 2005 Edition)

(a) National MUTCD. The MUTCD approved by the Federal Highway Administrator is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U. S. C. 109(d) and 402(a). ...

Manual on Uniform Traffic Control Devices, Federal Highway Administration, Revision 1, November 2004. (Published by the FHWA on the MUTCD Web Page; the FHWA does not publish the manual in hard format. Pertinent portions are in Appendix hereto; the full Manual is available on the internet at: http://mutcd.fhwa.dot.gov.)

AUTHORITIES – CASE LAW

No case law has been directed at the questions presented.

STATEMENT OF THE CASE

Nature of the Case

Petitioner Zol Hooper was cited by Murfreesboro police officer Kyle Evans for driving 50 miles per hour in a speed zone posted with a speed limit of 40 miles per hour on Rutherford Boulevard in the City of Murfreesboro, Tennessee, on March 1st, 2006. (Record, P. 6-7.) No other charge was made.

Course of the Proceedings - Municipal Court, Murfreesboro, Tennessee

On April 4th, 2006, defendant appeared in the City Court of Murfreesboro to contest his citation, pleading not guilty. The court found him guilty of the offense charged and imposed the appropriate fine and costs.

Federal Issue Raised - Circuit Court, Rutherford County, Murfreesboro, Tennessee

Defendant timely appealed this finding to the Circuit Court for Rutherford County. The hearing was held on August 9th, 2006, de novo on all issues of fact and law, with Judge Robert E. Corlew, III, presiding.

The hearing raised no controversy of fact regarding Defendants' actual speed. Examination of the City Traffic Director, Dana Richardson, by counsel for the

City established that the speed limit for that part of Rutherford Boulevard had been set in 1990 following an engineering study. Record, P. 13. The engineering study was necessitated by an increase in traffic volume, and was followed by raising the prior limit of 30 mph to 40 mph in the zone where Mr. Hooper's citation was issued. The study had been conducted in accordance with the Manual on Uniform Traffic Control Devices (MUTCD), as published by the Federal Highway Administration (FHWA). Record. P. 14.

Upon cross-examination, Mr. Richardson established that the road in that segment had been designed for a speed of 50 mph. Record, P. 18.

The citing officer, Officer Kyle Evans, testified that that segment of road had a significant volume of traffic that traveled at speeds exceeding the posted limit of 40 mph. Record, P. 10, P. 29.

Mr. Richardson testified that he had informed the City, when the speed limit was posted in 1990, that:

> "While vehicles may be exceeding the posted speed limit, the problem may not always lie with the drivers, but with the speed limit itself. It is therefore the job of the Engineering Department to gather the data necessary to make these determinations and evaluations." Record, P. 19.

He had written in that 1990 action that:

> "After approximately one year of operation under the new speed postings, studies will again be done to evaluate speed changes at the same locations previously used." Record, P. 19.

Cross-examination of Mr. Richardson further established that the study which set the speed limit in 1990 was the "most current study along that stretch of road." Record, P. 16. No further engineering study had been performed in the 16 years that had passed since then, as noted in the conclusions of the Court:

> "I understand your contention there, that the city contends of course that the last study was done in 1990. That's why this is here; since there hasn't been a study since 1990." Record P. 38.

Further testimony established that the MUTCD states:

> "At least once every 5 years, States and local agencies should reevaluate non-statutory speed limits on sections of their roadways that have undergone a significant change in roadway characteristics or surrounding land use since the last review." Record, P. 20, referring to MUTCD § 2B.13.

There was disagreement whether the 16 years of changes at either end of the Boulevard amounted to

"significant change," but, in the end, the Court stated:

> "If we find, and I'm not there, that the study should have been done, then we come to the conclusion certainly that the city's in violation of this." Record, P. 39

The gravamen of Hooper's argument was:

> " ... what we have in this particular case is a traffic study that was done when the defendant was a three-year-old toddler, a study that was done anticipating that an update would be done within a year; and with a Federal Code that requires them to be done every five years, has not been done in sixteen. ... the law has not been followed with respect to keeping engineering studies and other factors properly evaluated, periodically, in that stretch of road. ... he has not, not violated a currently applicable speed limit. That's the totality of the case, your Honor." Record P. 32 - 33.

Disposition in the Circuit Court

The Court, after pondering at length the requirements of the MUTCD and the facts which related to it, turned its attention to the public policy issues it felt were more important:

> "I think in short, I think I still have to come back to the policy issue before me, my decision,

> to determine whether to enforce the speed limits or not enforce; and I understand that the - the fact that we need a speed limit. ... I don't think I could find that the speed limits, the posted speed is invalid; and since it is not invalid, of course, I think I must find the defendant guilty." Record, P. 41.

The Order Dismissing Appeal was filed in the Circuit Court on September 6th, 2006.

Tennessee Court of Appeals, Nashville, Tennessee

Defendant/Appellant, Mr. Hooper, filed his Notice of Appeal from the Circuit Court on September 22nd, 2006, asserting that failure to comply with the MUTCD voids the enforceability of a traffic control device, and the court should therefore have dismissed the speeding citation, as he urged in the hearing in the court below. (Record, P. 32-33.)

Argument was presented in the Court of Appeals of Tennessee for the Middle Division on June 12, 2007 and the Court of Appeals filed their Final Memorandum Opinion on August 14th, 2007, affirming the judgment of the trial court. The Court wrote:

> "Finally, and most importantly, even if the MUTCD were mandatory and regulated the setting of speed limits ... Hooper cites no authority to support his assertion that a failure ... to timely reevaluate the speed limit

> renders the posted speed limit invalid and voids his speeding ticket." Opinion, P. 4.

This position, in summary, holds that the MUTCD is not mandatory; it does not regulate the setting of speed limits, and, even if the MUTCD had such authority, the speed limit would remain valid without complying with the MUTCD.

Supreme Court of Tennessee

Application for Permission to Appeal was timely submitted to the Supreme Court of the State of Tennessee, on the basis that the Court of Appeals did not properly construe the MUTCD.

The Supreme Court of Tennessee filed its order denying permission to appeal on November 13th, 2007.

REASONS FOR GRANTING THE WRIT

PUBLIC CONFIDENCE IN THE LAW

The traffic stop is perhaps the most common personal experience the average citizen has with the police power of the State. This experience, repeated many thousands of times each year in every state, is a fundamental building block for establishing respect - or disrespect - for the "Laws of the land" and the governments which enforce them.

For this reason, it is critical that the citizen has confidence that the police power they experience personally is exercised in conformance with all applicable laws.

Popularization of the term "speed trap" suggests that some segments of the population are not confident with the way speed laws are established or enforced. To the extent that the laws being enforced are founded on Federal authority, the frequency of this event makes it "an important question of federal law" which, if it has not yet been, should be settled by the Supreme Court of the United States.

FEDERAL AUTHORITY

The establishment of "post roads" and the regulation of "interstate commerce" are fundamental purposes for which our Constitutional government was formed. Congress has deemed that this power encompasses the highways across the country, and has found the establishment of operating regulations and the

postings of them to be a necessary and proper component of the power conferred. It has established a federal agency, the Federal Highway Administration (FHWA), to administer this authority, and the FHWA has promulgated regulations setting uniform standards for highway design and operation, including the signage.

THE MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (MUTCD)

- MUTCD TERMINOLOGY

The controversy in this case focuses entirely on the wording, scope and authority of the National Manual on Uniform Traffic Control Devices (MUTCD), the FHWA's publication setting forth the rules for highway signage and the engineering principles upon which they are founded.

The Trial Court wrestled with the terminology and effect of the MUTCD. The transcript almost takes on the character of a plea for help:

> "... I was not familiar with the, MT, CD - ... until this suit. ... based upon the arguments that you've made on this section 2B-13 it's probably the key factor for us to consider here this afternoon. ... 2B-13 it appears we have most of these headings also; "standards" with "guidance"; "options" finally, there appears to be further "guidance," and, in the end, "support."
>
> "I will acknowledge to you, again, that I have some question as to what is mandatory under the provisions of the state law ... The rules of the State Department of Transportation provide for setting speed limits. Tennessee's rules will govern signs and locations involving signs, signals that are to be posted and such things on or along streets and highways. [The Tennessee Department of Transportation

> regulation refers to the] Manual on Uniform Traffic Control Devices, the MTCD ... "
> "And I guess I'm still left to my own consideration as to whether to consider just the "standard" being mandatory, or the "standard" and the "guidance", or the "standard" and the "guidance" and the "support." ..."
> "... The question I have is, is the, "should", that's in guidance, is that binding? Or is it just the "standard" that's binding? ..."
> "With all due respect to the Federal level, to Congress, the MUTCD itself is not well written, in my humble opinion. Maybe they would say the same thing about some of my humble opinions as well. ... Maybe, with all due respect, this whole section may mean more to traffic engineers perhaps than it does to us lawyers and judges. ..." Record, P. 35 ff.

In the end, this court was not able to sort out the different levels of obligation presented in the MUTCD, and decided the case as a matter of public policy - and by so doing, controverted the authority of Congress.

- DEARTH OF MUTCD-RELATED PRECEDENT

Much of the challenge in this case derives from the absence of precedent on the issue of the authority of the MUTCD. When Mr. Hooper argued that the MUTCD itself is mandatory, the City pointed out:

> "Would it please the Court, we have no case law." Record, P. 32.

In reviewing the case, the Tennessee Court of Appeals avoided the task of clarifying the distinctions between the elements of the MUTCD which had so frustrated the Circuit Court, simply stating that:

> "... the MUTCD provision upon which he relies uses language that is not mandatory, stating only that the speed limits "should" be reevaluated every five years... Hooper cites no authority to suggest that "should" must be read as "shall" in this context." Opinion. p. 4.

The Court of Appeals left the issue without identifying precedent authority. It rejected the idea that there might be some level of obligation that lies between the mandatory "shall" and the permissive "may," despite the differing uses of these three terms throughout the MUTCD. It simply applied the term "should" as if it were a "may," which is just as unjustifiable as treating it as a "shall."

- SCOPE OF THE MUTCD

The Court of Appeals went even further to limit the authority of the MUTCD by confining its scope to the configuration of signs. Their construction of the MUTCD denied the power of the regulation over the setting of traffic rules such as speed limits:

> "... the MUTCD was adopted by Tennessee as a 'manual for the design and location of signs, signals, markings, and for posting of traffic regulations on or along all streets and highways in Tennessee ...; it regulates the use of signs, signals, and other devices, not the setting of speed limits." Opinion, P. 4.

- AUTHORITY OF THE MUTCD

The combined efforts of the Tennessee courts in this case have had the effect of drawing into question the validity of the Manual on Uniform Traffic Control Devices, one of Congress' most important statutory schemes for bringing order to the national highway system.

SUPREME COURT RESOLUTION NEEDED

In this case, the courts of the State of Tennessee have decided a question of federal law which is important because it directly affects every person who uses the nation's roads, and it is the foundation for the most common interaction between normal citizens and the police power of their government, the traffic stop. The statements of the courts in this case have highlighted the absence of federal guidance on the subject. More compelling, they have come to conclusions that conflict with the plain meaning of the controlling federal regulation. If the United States Supreme Court does not intervene, Tennessee will continue to hold the authority of Congress manifested in the MUTCD as an optional guide,

limited to posting of signs without any traffic engineering authority, and only provisions using the word "shall" having any obligatory effect.

MUTCD TERMINOLOGY STANDARDS PROVIDED

The terms which so confounded the Circuit Court are defined in the Introduction to the MUTCD:

> "Throughout this Manual the headings Standard, Guidance, Option, and Support are used to classify the nature of the text that follows.
>
> 1. Standard—a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. ... The verb shall is typically used. Standards are sometimes modified by Options.
> 2. Guidance—a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. ... The verb should is typically used. Guidance statements are sometimes modified by Options.
> 3. Option—a statement of practice that is a permissive condition and carries no requirement or recommendation. Options may contain allowable modifications to a Standard or Guidance. ... The verb may is typically used.

> 4. Support—an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. ... The verbs shall, should, and may are not used in Support statements."
> MUTCD, Page I-1, I-3.

These definitions clearly show that the "should" which is relied upon by the petitioner has been designated by Congress as a term that embodies some element of obligation, which distinguishes it from the "may" of merely permissive actions; but does not raise it to the inflexible compulsion wielded with the use of the term "shall."

Petitioner has argued that the "Guidance" definition shows that the actions that "should" be taken are "not mandatory" only because "deviations [are] allowed if engineering judgment or engineering study indicates the deviation to be appropriate." The City, in this case, was obligated to perform a reevaluation of the Rutherford Boulevard speed zone, as put forth in the MUTCD, unless "engineering judgment" had concluded that some other action was more appropriate. But no such "engineering judgment" was ever made to preempt the MUTCD "guidance," and that is why the speed limit, Hooper urges, had lapsed.

There is no precedent to confirm either this argument or the argument of the Court of Appeals that the only choice for "guidance" statements, since they do not invoke the term "shall," is to leave them

as options, equating the terms "should" and "may." This solution offered by the Court of Appeals plainly defeats the legislative intent of Congress, which distinguishes these terms.

MUTCD SCOPE INCLUDES SETTING SPEED LIMITS

The constraints which the Court of Appeals put on the authority of the MUTCD over how speed limits are to be set again conflict directly with the provisions of the MUTCD.

MUTCD Section 2B.13 states:

> 1: That the posting of a speed limit is authorized only "after an engineering study has been made in accordance with established traffic engineering practices": Such studies determine what speed limit is to be "set."
>
> 2: That "The speed limits shown shall be in multiples of ... 5 mph." This is a criterion for "setting" a speed limit.
>
> 3: That "At least once every 5 years, States and local agencies should reevaluate non-statutory speed limits." This criterion determines whether a speed limit is "set" at an appropriate level.
>
> 4: That "when a speed limit is posted, it should be within ... 5 mph of the 85th-percentile speed of free-flowing traffic." This criterion is the most favored quantitative foundation for "setting" speed limits across the nation.

5: That "Other factors that may be considered when establishing speed limits are the following:

A. Road characteristics, shoulder condition, grade, alignment, and sight distance;

B. The pace speed;

C. Roadside development and environment;

D. Parking practices and pedestrian activity;

E. Reported crash experience for at least a 12-month period."

The clear function of these provisions of the MUTCD is to exert a controlling power over how speed limits are "set" before they are posted. To posit that the MUTCD "regulates the use of signs, signals, and other devices, not the setting of speed limits" (Opinion. P. 4.) is to deny these provisions, which were promulgated under the authority of Congress.

MUTCD INTERACTION WITH STATE LAW

The Court of Appeals pointed out correctly that the Tennessee Code authorizes the State Department of Transportation, county authorities, and municipalities to establish speed limits. (T. C. A. §55-8-152; see also Speed Zones, T. C. A. §55-8-153.) There is no conflict between the MUTCD and the Tennessee Code because the authority conferred by the code allows that speed limits may be set; it does not dictate or limit how they are to be set. The requirements of the MUTCD can be fully satisfied

under this authority. But the Circuit Court and the Court of Appeals failed to integrate the federal authority with that of the State as Congress intended:

> "The responsibility for the design, placement, operation, maintenance, and uniformity of traffic control devices shall rest with the public agency or the official having jurisdiction. 23 CFR 655.603 adopts the Manual on Uniform Traffic Control Devices as the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel. ... " MUTCD §1A.07.
>
> "All regulatory traffic control devices shall be supported by laws, ordinances, or regulations." MUTCD §1A.08.

PUBLIC POLICY - AS PERCEIVED BY STATE COURTS

Unable to untangle the unfamiliar use of terms in the MUTCD, the Circuit Court turned to consider the public policy issues as it saw them, and concluded the case on that basis:

> "I think in short, I think I still have to come back to the policy issue before me, my decision, to determine whether to enforce the speed limits or not enforce; and I understand that the - the fact that we need a speed limit. So I think I come to the bottom line that while I really appreciate the education that you folks have given me. Certainly this has been pretty instructive to me and ... I don't think I could

find that the speed limits, the posted speed is invalid; and since it is not invalid, of course, I think I must find the defendant guilty." Record, P. 41.

Following the same line of thought, the Court of Appeals wrote:

> "Finally, and most importantly, even if the MUTCD were mandatory and regulated the setting of speed limits for the City, Hooper cites no authority to support his assertion that a failure by the City to timely reevaluate the speed limit renders the posted speed limit invalid and voids his speeding ticket. If we were to adopt Hooper's reasoning, taken to its logical conclusion, this would mean that the posted speed limit for any road not timely reevaluated by the municipality would automatically become invalid. Such roads would effectively have no speed limit, and the municipalities would be left unable to protect the public safety and welfare. We respectfully decline to adopt this argument." Opinion. P. 4.

PUBLIC POLICY - AS ESTABLISHED BY CONGRESS

In the absence of controlling precedent, the courts may be excused for resorting to principles of public policy in resolving this case. But here, again, they have erred, because the policy they have settled upon conflicts with public policy decisions that have already been formed by Congress.

The importance of establishing a speed limit and enforcing it was the basis for these conclusions, and is shared with the judgment of Congress. But Congress has looked more deeply into the question, and has placed restraints on the processes by which speed limits are established. Where the courts in this case have concluded that any speed limit is O. K., Congress has concluded that speed limits must have a foundation in established engineering practices. Congress has gone so far as to state that even the Standards of the MUTCD "shall not be a legal requirement for [installation of traffic control devices.]" But when the devices are to be employed,

> "The decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment. Thus, while this Manual provides Standards, Guidance, and Options for design and application of traffic control devices, this Manual should not be considered a substitute for engineering judgment.
> "... Jurisdictions with responsibility for traffic control that do not have engineers on their staffs should seek engineering assistance from others, such as the State transportation agency, their County, a nearby large City, or a traffic engineering consultant." MUTCD § 1A.09.

The Congressional mandate on the use of speed limits reinforces this formulation of policy by

predicating the posting of a speed limit upon engineering standards used in the prior determination of the appropriate limit:

> "After an engineering study has been made in accordance with established traffic engineering practices, the Speed Limit (R2-1) sign (see Figure 2B-1) shall display the limit established by law, ordinance, regulation, or as adopted by the authorized agency." MUTCD §2B.13.

The policy of Congress is that engineering studies and judgment are necessary to determine what speed limits are necessary; only then are the speed limits to be posted and supported by appropriate state or local legislation. In this manner Congress has decreed that whimsey, politics, and wild guesses do not suffice to set a speed limit.

The fears expressed in the Opinion by the Court of Appeals have emotional appeal; but the Tennessee Code has adequate provisions to prevent the hazards to public safety imagined by the Court. T. C. A. § 55-10-205 prohibits outright reckless driving and imposes appropriate sanctions at law; and T. C. A. 55-8-136 (b) deals with less onerous lapses of driver caution:

> "Notwithstanding any speed limit or zone... every driver of a motor vehicle shall exercise due care... by operating such motor vehicle at a safe speed, ... under the existing circumstances to avoid endangering life, limb or property."

CONCLUSION AND PLEA

NECESSITY FOR SUPERVISION BY THE SUPREME COURT OF THE UNITED STATES

Congress has fulfilled its Constitutional obligations by establishing a sensible policy regarding setting and posting speed limits; the MUTCD is the mechanism by which this was done. The Tennessee Legislature has done its duty by providing the framework for the State and its subdivisions to regulate the roads within their jurisdiction, and has done so in a way that accommodates the MUTCD.

But the courts in this case have substituted their own impressions of what public policy is needed, and have given it the effect of law. By coming up with their own variation of what public policy should be, and disregarding the policy already decided and published by Congress in exercise of their enumerated powers, the courts of Tennessee have run afoul of Article VI of the Constitution of the United States:

> Clause 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...

To remedy this error, and to give effect to the efforts of Congress to satisfy their Constitutional duty

regarding highways, the authority of the United States Supreme Court in this case is necessary.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

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